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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DAVID BARAJAS, Defendant and Appellant.	F041273 (Super. Ct. No. 1014013) **OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Glenn A. Ritchey, Jr., Judge.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, David A. Rhodes and Clayton S. Tanaka, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant David Barajas appeals from his conviction of second degree murder. In the published part of this opinion, we hold that the court did not err in failing to give

*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I.A, I.C., and II.

CALJIC No. 8.72 (reasonable doubt between murder and manslaughter) sua sponte when it gave a proper instruction in accordance with CALJIC No. 17.10 (conviction of lesser offense instead of greater). In the unpublished part, we address two additional jury instruction issues, defendant's contention that the court erred in denying his motion for a new trial, and defendant's contention that the attorney who represented him on the new trial motion rendered ineffective assistance. We affirm.

FACTUAL AND PROCEDURAL HISTORIES

Sometime before midnight on September 16, 2000, toward the end of a night of drinking and cocaine use, defendant and two friends arrived at a Modesto bar. The three became involved in a confrontation with a group of other patrons. Defendant drew a handgun from his pants and shot Sidronio Alvarado Perez, one of the other patrons, five times at close range, killing him. The District Attorney filed an information charging defendant with murder (Pen. Code, § 187)[1] with a special allegation of handgun use (§ 12022.53, subd. (d)).

The defense was self-defense. Defendant testified that a few weeks before the shooting, he had been attacked in his back yard by four men he did not know. He brought the gun with him the night of the shooting because of this prior event. In the bathroom at the bar, the victim (who was not one of the men who attacked him earlier) threatened to kill defendant unless defendant had his friends buy cocaine from the victim. Defendant replied that he had a gun in the car. The victim repeated that he would kill defendant if his friends did not buy the victim's cocaine. The victim also said, "'Bring your gun and I'll take it away from you and kill you with it.'" Defendant was frightened by this conversation. Afterward, he decided to leave the bar and walked toward the door. The victim and his brother, Damaso, moved to intercept him. Damaso was holding a pool cue. Defendant drew the gun, placed the magazine in it, and told Damaso to come

[1]Statutory references are to the Penal Code unless otherwise indicated.

no closer. Damaso stopped, but the victim told his brother, "'Don't be afraid of him.'" The victim then proceeded toward defendant. Defendant chambered a bullet and told him to stop. The victim still kept coming, saying that handguns are for men. Defendant moved toward the door, but encountered another person holding a pool cue. He turned toward the victim and again told him to stop, but the victim kept coming slowly toward him. Defendant fired a shot at the ceiling. The victim continued his approach, smiling, and defendant pointed the gun at him and again warned him to stop. The victim kept coming, and defendant finally fired at him.

Defendant recalled firing only one shot at the victim, after which Damaso struck at the gun with the pool cue and hit defendant in the face with the cue. Defendant stated that he had no memory of what happened next, but a forensic pathologist testified that the victim was shot five times. Defendant said that he shot the victim because he was afraid the victim and his brother would take the gun and kill him.

The prosecution's evidence painted a different picture. Daniel Sandoval-Arce (Sandoval), one of defendant's companions the night of the shooting, testified for the prosecution. He said that before the confrontation between defendant and the victim, another of defendant's companions, named Valentin, got into a conflict with two men. The two men said Valentin gave them a dirty look. Valentin and the two men then went out into the parking lot, and defendant and Sandoval followed. In the parking lot, they found Valentin arguing with the men. The men made threatening movements toward Valentin. Defendant became angry, retrieved the gun from the car he and his companions had arrived in, and brandished it. The two men then left, and defendant put the gun in his waistband and went inside.

Inside the bar, Valentin became embroiled in an argument with the victim and Damaso. He went over to defendant's table and told defendant about the argument. Defendant again became angry and pulled the gun out, then put it back in his waistband. Valentin went back to the bar and resumed his argument with the victim and Damaso. As

Sandoval stood nearby observing, defendant rose from the table and approached. The victim held no weapons. Sandoval testified that he and defendant then moved away around one side of a pool table as the victim and Damaso moved around the other side. He testified that he and defendant were trying to leave, but a police detective testified that Sandoval previously said he and defendant were trying to block the victim's path.

Damaso testified that he was not present when the shooting happened and that he was in the bathroom when he heard the shots. Another of the victim's companions, Raul Lavoy-Cruz, testified that, after emptying the gun into the victim, defendant pointed it at another man and twice pulled the trigger.

The pathologist described the victim's wounds. There were three entrance wounds on the front of the victim's body. There was one entrance wound on his back, corresponding to an exit wound on his chest. There was also a wound on one of his fingers. Except for the shot that struck the finger, each shot could have caused the victim's death independently.

After the shooting, the victim's companions seized and beat defendant, using a bottle and the butt of defendant's gun. Defendant was hospitalized for about a week.

The jury found defendant guilty of second degree murder and found the handgun use allegation true. Defendant discharged his trial counsel and retained new counsel. He filed a motion for a new trial, arguing that his trial counsel provided ineffective assistance. The court denied the motion. Defendant was sentenced to an aggregate term of 40 years to life, consisting of 15 years to life for second degree murder and a consecutive term of 25 years to life for the handgun use enhancement.

DISCUSSION

I. Jury instructions

Defendant argues that the court erred in failing or refusing to give three jury instructions. In a criminal trial, the court must give an instruction requested by a party if the instruction correctly states the law and relates to a material question upon which there

is evidence substantial enough to merit consideration. (*People v. Avena* (1996) 13 Cal.4th 394, 424; *People v. Wickersham* (1982) 32 Cal.3d 307, 324, overruled on other grounds by *People v. Barton* (1995) 12 Cal.4th 186, 201.) The court must also give some instructions sua sponte:

> "'[E]ven in the absence of a request, a trial court must instruct on the general principles of law governing the case, i.e., those principles relevant to the issues raised by the evidence, but need not instruct on specific points developed at trial. "The most rational interpretation of the phrase 'general principles of law governing the case' would seem to be as those principles of law *commonly* or closely and openly connected with the facts of the case before the court." [Citations.]'" (*People v. Michaels* (2002) 28 Cal.4th 486, 529-530.)

The court has no duty to give an instruction if it is repetitious of another instruction also given. (*People v. Turner* (1994) 8 Cal.4th 137, 203.) """[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction."""" (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.)

A. Antecedent threats

The court gave several instructions related to self-defense: CALJIC No. 5.15 (murder—burden of proof regarding justification or excuse), with an added clarification that the defendant need not prove self-defense; CALJIC No. 5.12 (definition of self-defense); CALJIC Nos. 5.13, 5.14 and 5.16 (justifiable homicide to prevent forcible and atrocious crime and related definitions); and CALJIC No. 5.50 (self-defense—assailed person need not retreat).

Defendant proposed the following additional instruction:

> "One who has received threats made by another against his life or person is justified in acting more quickly and taking harsher measures for his own protection in the event of an actual or threatened assault than would be a person who had not received such threats.
>
> "If in this case you believe from the evidence that the complaining witness made threats against the defendant and that the defendant, because

> of such threats made before the event that is the basis for the charge against [him] [her], had reasonable cause to fear greater peril in the event of an altercation with the complaining witness than [he] [she] would have otherwise had, you must take such threats into consideration in determining whether the defendant acted in a manner in which a reasonable person would act in protecting his own life or bodily safety."

The prosecutor objected, and the court refused to give the instruction. Addressing this instruction along with some others it refused, the court explained:

> "In any event, the Court found that as to the refused instructions, that other instructions, not just [CALJIC No.] 5.15 as to some instructions, but other instructions given covered these matters, and it was my conclusion that the pinpoint instructions were not in order, they offered some problems with clarity, and, therefore, the Court rejected them and sustained the People's objection."

Defendant contends that the court erred in refusing to give the requested instruction.

The requested instruction has a long history and must be given if requested and sufficiently supported by evidence. An almost identical instruction was given in *People v. Bradfield* (1916) 30 Cal.App. 721, 727. In *People v. Graham* (1923) 62 Cal.App. 758, 765, the court held that essentially the same instruction was properly given. In *People v. Torres* (1949) 94 Cal.App.2d 146, 151-153, the court reversed a second degree murder conviction because the trial court refused to give a similar instruction. In *People v. Moore* (1954) 43 Cal.2d 517, the California Supreme Court cited *Torres, Graham* and *Bradfield* in reversing a conviction of manslaughter partly on the ground that the court refused to give a slightly re-ordered version of the same instruction. *Moore* involved the shooting of a husband by his wife during an altercation between them and after a long history of abuse and death threats by the husband. (*Moore, supra,* at pp. 519-522.) The court stated:

> "The defense relies on the theory of self-defense and, in view of the facts presented … the question of which one of the two was the aggressor was of vital importance in the case. The jury should have been instructed on the possible influence of antecedent threats so far as the conduct of defendant … was concerned." (*People v. Moore, supra*, 43 Cal.2d at p. 529.)

Moore was followed in two later cases. (*People v. Pena* (1984) 151 Cal.App.3d 462, 475 [voluntary manslaughter conviction reversed; defense-requested antecedent-threat instruction should have been given because the "evidence reasonably supports two interpretations, i.e., that defendant was either the aggressor or the victim of fear induced by the deceased's threats or actions"]; *People v. Bush* (1978) 84 Cal.App.3d 294, 304 [involuntary manslaughter conviction reversed; defense-requested antecedent-threat instruction should have been given where "there is evidence tending to show the making of threats of death or great bodily harm by deceased against the defendant, which are relied on as influencing or justifying defendant's act"].) We recently acknowledged this line of authority in considering a related issue regarding whether an antecedent-threat instruction must be given sua sponte. (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488.) In addition, after the trial in this case, a prior-threat instruction based in part on *Moore* and *Pena* recently was added to CALJIC. (CALJIC No. 5.50.1.)

The court erred in refusing to give the instruction in this case. The other instructions given on self-defense did not address antecedent threats. Further, those instructions emphasized that the danger feared by defendant must be "present," "imminent," "immediate," and "instantly dealt with." (CALJIC Nos. 5.12, 5.13.) These instructions correctly stated the law, but, without an antecedent-threat instruction, there was a danger that the instructions could "divert [the jurors'] attention from the previous threats" (*People v. Torres, supra,* 94 Cal.App.2d at p. 153) because the "jurors could believe they were precluded from considering the effect of prior threats on defendant's perception of his *immediate* danger. [Citations.]" (*People v. Pena, supra*, 151 Cal.App.3d at p. 475; see also *People v. Bush, supra*, 84 Cal.App.3d at p. 304 [without antecedent-threat instruction, self-defense instructions referring to immediate danger might have diverted jurors' attention from evidence of prior threats].)

In summary, the court did not follow the general rule that an instruction sufficiently supported by evidence and not covered by other instructions must be given if

requested. Nevertheless, we conclude the court's error was harmless since it is not "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

The purpose of the requested instruction was to direct the jury's attention to the effect the alleged antecedent threat had on whether defendant acted reasonably in shooting the victim and, thus, whether the shooting was justified. In light of the evidence, there is no reasonable probability that the jury would have found the shooting to be justified if it had been given the instruction. The uncontested medical evidence was that the victim was shot five times, including once in the back. Except for the shot that hit the victim's finger, each shot caused serious and potentially fatal injury. The victim was unarmed. Even if the jury believed the victim threatened defendant, it is not reasonably probable that the requested instruction would have prompted it to find defendant not guilty based on self-defense.

This case is similar to some of the antecedent-threat cases cited earlier in that there was a conflict in the evidence regarding who was the aggressor. (See *People v. Pena, supra,* 151 Cal.App.3d at p. 475; *People v. Torres, supra*, 94 Cal.App.2d at p. 153; cf. *People v. Moore, supra*, 43 Cal.2d at p. 529 [little conflict in the evidence, but inferences drawn from it regarding who the aggressor was were "diametrically opposed"].) But this case is distinguishable in that defendant used an overwhelming amount of deadly force against an unarmed victim who had done him no violence. For example, in *Torres,* where the defendant killed the victim with a single stroke of a knife, the victim was also armed with a knife. (*People v. Torres, supra*, 94 Cal.App.2d at pp. 148, 149.) In *Moore*, the victim was killed by a single shot fired as he stood over the defendant, whom he had knocked to the floor. (*People v. Moore, supra*, 43 Cal.2d at pp. 521-522, 523.) In *Bush*, the defendant stabbed her husband several times after he beat her, choked her, and said he would kill her, and following a long history of similar beatings and threats. (*People v. Bush, supra*, 84 Cal.App.3d at pp. 299-301.) In *Pena*, the victim was shot once and there

was evidence that this happened as he lay on top of the defendant, having attacked him. (*People v. Pena, supra,* 151 Cal.App.3d at p. 472.) We conclude that none of these cases supports the view that here it was reasonably probable that an instruction calling the jury's attention to the prior-threat evidence would have caused it to find defendant's conduct justified.

Defendant also argues that if the instruction had been given, the jury would have been more likely to find that defendant had an actual but unreasonable belief in the necessity of defending himself and, therefore, would have been more likely to find him guilty of the lesser-included offense of voluntary manslaughter. We disagree. The instruction contains no language regarding the actual but unreasonable belief necessary to reduce murder to voluntary manslaughter. It only directs the jury to consider threat evidence "in determining whether the defendant acted in a manner in which a reasonable person would act …." It is therefore addressed only to self-defense, not imperfect self-defense. Defendant does not argue that the court should have added language to the instruction sua sponte to expand it to cover imperfect self-defense. Further, we know of no authority that would support that argument.

Defendant essentially argues that a harmless-error standard different from the *Watson* standard applies here. He contends that the court's refusal to give the instruction violated his constitutional right to due process and was reversible because it had a "substantial and injurious influence on the verdict obtained." This position is without merit.

The case from which defendant takes the phrase "substantial and injurious influence on the verdict," *O'Neal v. McAninch* (1995) 513 U.S. 432, is inapposite. *O'Neal* sets forth the harmless-error standard applied by a federal court in ruling on a petition for habeas corpus when it finds a constitutional error. (*Id.* at pp. 434-435.) We are not a federal court reviewing a habeas corpus petition, and defendant cites no authority holding that the failure to give an antecedent-threat instruction is a

constitutional error to which an elevated harmless-error standard applies. In addition, the cases defendant cites in which instructional errors violated due process involved more serious instructional errors than here. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277 [constitutionally deficient reasonable-doubt instruction]; *Barker v. Yukins* (6th Cir. 1999) 199 F.3d 867, 873 [refusal to instruct that defendant would have been justified in using deadly force to repel an imminent rape]); *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739 [refusal to instruct on simple kidnapping where charged offense was kidnapping for robbery].) In this case, *Watson* is the applicable standard. The error was harmless.

B. CALJIC No. 8.72

Defendant argues that the court should have given the following instruction, CALJIC No. 8.72, sua sponte:

> "If you are convinced beyond a reasonable doubt and unanimously agree that the killing was unlawful, but you unanimously agree that you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of that doubt and find it to be manslaughter rather than murder."

The People argue that the subject matter was adequately covered by other instructions given by the court. The court instructed with CALJIC Nos. 8.10, 8.11, 8.30 and 8.31, providing definitions relevant to murder. It gave CALJIC Nos. 8.37, 8.40, and 8.45, providing definitions pertinent to voluntary and involuntary manslaughter. It also gave CALJIC No. 17.10:

> "If you are not--if you, the jury, are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, you may, nevertheless, convict on a lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime.
>
> "The crime of voluntary manslaughter, Penal Code Section 192, Subdivision A, a felony, is lesser to that of second degree murder, Penal Code Section 187, as charged in the information.
>
> "The crime of involuntary manslaughter, Penal Code Section 192, Subdivision B, a felony, is lesser to that of second degree murder, Penal Code Section 187, as charged in the information.

> "Thus, you, the jury, are to determine whether the defendant is guilty or not guilty of the crime charged, that is, second degree murder, or of any lesser crimes--any lesser crime. In doing so, you have the discretion to choose the order in which you will evaluate each crime and consider the evidence pertaining to it. You may find it productive to consider and reach a tentative conclusion on the charge and lesser crimes before reaching any final verdict. However, the Court cannot accept a guilty verdict on a lesser crime unless you have unanimously found the defendant not guilty of the charged crime."

Defendant relies on *People v. Dewberry* (1959) 51 Cal.2d 548 and *People v. Aikin* (1971) 19 Cal.App.3d 685, disapproved on other grounds in *People v. Lines* (1975) 13 Cal.3d 500, 514. In *Dewberry*, the defendant was convicted of second degree murder. (*Dewberry, supra,* at p. 550.) The court instructed on the elements of murder and manslaughter. It also instructed that if the jury was convinced beyond a reasonable doubt that the defendant committed murder but had a reasonable doubt as to the degree, it may convict only of second degree murder. (*Id.* at p. 554.) The court refused to give the following instruction:

> "'You may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, if, in your judgment, the evidence supports such a verdict under my instructions.
>
> "'To enable you to apply the foregoing instruction, if your findings of fact require you to do so, I instruct you that the offense of murder, of which the defendant is charged in Count I of the indictment, necessarily includes the crime of manslaughter.
>
> "'If you find that defendant was guilty of an offense included within the charge of the indictment, but entertain a reasonable doubt as to the degree of the crime of which he is guilty, it is your duty to convict him only of the lesser offense.'" (*People v. Dewberry, supra,* 51 Cal.2d at p. 554.)

Our Supreme Court held that the refusal to give this instruction was error because the instructions as given had "the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder" and not also as between murder and manslaughter. (*People v. Dewberry, supra,*

51 Cal.2d at p. 557.) In *Aikin*, the court held that an instruction like the one at issue in *Dewberry* must be given sua sponte. (*People v. Aikin, supra*, 19 Cal.App.3d at p. 704.)

The People argue that CALJIC No. 17.10 satisfies the requirements of *Dewberry*. We agree. CALJIC No. 17.10, when its blanks are filled in for murder and manslaughter, is logically equivalent to CALJIC No. 8.72. If a jury is convinced beyond a reasonable doubt that a defendant is guilty of either a greater or a lesser offense, this can only be because it has a reasonable doubt about elements of the greater offense and no reasonable doubt about any elements of the lesser. Under these circumstances, CALJIC No. 17.10 instructs the jury to convict of the lesser offense. CALJIC No. 8.72 does the same. As we recently stated, "'the court is required to instruct sua sponte only on general principles which are necessary for the jury's understanding of the case. It need not instruct on specific points … which might be applicable to a particular case, absent a request for such an instruction.'" (*People v. Garvin, supra,* 110 Cal.App.4th at p. 488.)

People v. St. Germain (1982) 138 Cal.App.3d 507 is consistent with our conclusion. There the defendant was convicted of robbery and grand theft. (*Id.* at p. 511.) The court instructed the jury with CALJIC No. 17.10, indicating that petty theft was a lesser-included offense of both grand theft and robbery, and that if the jury found the defendant not guilty of the charged offense, it could find him guilty of a lesser offense. (*Id.* at p. 520.) The court refused an additional instruction stating that if the evidence supported both a charged and a lesser offense, but the jury had a reasonable doubt as to which was committed, it could convict only of the lesser offense. (*Id.* at p. 521.) The court held that CALJIC No. 17.10 covered the situation. The court reasoned that the requested instruction "and CALJIC No. 17.10 both tell the jury that if they find that the prosecution has not proven the elements of robbery (the greater offense) beyond a reasonable doubt then the defendant may be found guilty of the lesser offense (petty theft) if that offense has been proven beyond a reasonable doubt." (*People v. St.*

Germain, supra, 138 Cal.App.3d at p. 522.) CALJIC No. 17.10 "adhered precisely to *Dewberry*." (*St. Germain, supra,* at p. 521.)

Another division of the same appellate district had earlier reached a contrary conclusion. In *People v. Reeves* (1981) 123 Cal.App.3d 65, disapproved on other grounds in *People v. Sumstine* (1984) 36 Cal.3d 909, 919, fn. 6, the defendant was convicted of burglary. (*Reeves, supra,* at p. 67.) The court gave CALJIC No. 17.10, informing the jury of its ability to convict of the lesser offense of "trespass to land to interfere with business." (*Reeves, supra,* at pp. 69-70.) The defendant argued that the court also should have, sua sponte, instructed the jury that if it had a reasonable doubt between the greater and lesser offenses, it could convict only of the lesser. (*Ibid.*) The appellate court agreed, although it held the error was harmless. (*Id.* at p. 70.)

We agree with the *St. Germain* court's reasoning. Since the court gave CALJIC No. 17.10, it did not err in failing to give CALJIC No. 8.72 sua sponte. We reserve for another day the question whether *St. Germain* is correct in holding that the second instruction need not be given even if requested.

C. Unreasonable belief in necessity to defend

Defendant requested the following instruction, which the court refused to give:

> "There need not be a reasonable basis for the defendant's honest belief in the necessity to defend himself. That unreasonable belief may be the product of intoxication, delusion, or mistaken perception."

Defendant contends this was error.

As a threshold matter, the People argue this issue has not been preserved for appeal because defendant's trial counsel withdrew the request for this instruction. Defendant contends that his counsel withdrew her request for a different instruction. The trial transcript is not clear, but we believe it most fairly supports defendant's reading of it. We conclude that defendant withdrew a proposed instruction regarding the victim's reputation for violence—not the instruction in question.

The People next argue that the other instructions the court gave on imperfect self-defense were adequate. The court instructed in accordance with CALJIC No. 8.40, defining voluntary manslaughter:

> "Every person who unlawfully kills another human being without malice aforethought, but with an intent to kill, or in conscious disregard for human life, is guilty of voluntary manslaughter …."

The court also gave CALJIC No. 5.17:

> "A person who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury kills unlawfully but does not harbor malice aforethought and is not guilty of murder. This would be so even though a reasonable person in the same situation, seeing and knowing the same facts, would not have had this same belief.…"

Finally, the court gave CALJIC No. 4.21.1:

> "It is a general rule that no act committed by a person while in a state of voluntary alcohol and/or drug intoxication is less criminal by reason of this condition. [¶] … [¶] However, there is an exception to the general rule, namely, where a specific intent or mental state is an essential element of a crime. In that event, you, the jury, should consider the defendant's voluntary intoxication in deciding whether the defendant possessed the required specific intent or mental state at the time of the commission of the alleged crime.
>
> "Thus, in the crime of second degree murder … or the lesser crime of voluntary manslaughter, … a necessary element is the existence in the mind of the defendant of a certain specific intent or mental state …. [¶] If the evidence shows that the defendant was intoxicated at the time of the alleged crime, you should consider that fact in deciding whether or not the defendant had the required specific intent or mental state."

Defendant emphasizes that although these instructions recognize that intoxication may negate the required mental state, they did not refer to delusion or mistaken perception. We conclude that the court's other instructions adequately covered the issues.

The first sentence of the requested instruction, "There need not be a reasonable basis for the defendant's honest belief in the necessity to defend himself," is ambiguous.

It fails to state that an unreasonable belief in the necessity to defend is only a defense to murder, implying that it could also be a defense to manslaughter. But even if the court had amended the instruction to correct this (see *People v. Falsetta* (1999) 21 Cal.4th 903, 924), the first sentence would have duplicated CALJIC No. 5.17, which makes this point.

With respect to the second sentence of the requested instruction, CALJIC No. 4.21.1 covers the fact that intoxication can help to establish a defense. Defendant concedes this.

Defendant points to nothing in the record that would support an instruction regarding delusion. Further, our own examination of the record reveals no evidence that defendant suffered from a delusion. Obviously, the court had no obligation to give an instruction that is unsupported by evidence.

Finally, the proposed instruction's reference to mistaken perception is also duplicative of CALJIC No. 5.17. In every case of an actual but unreasonable belief in the need for self-defense, the defendant necessarily suffered from some mistaken perception. The requested instruction would have added nothing to CALJIC No. 5.17.

II. New trial motion

Defendant argues that the court erred in denying his motion for a new trial. Alternatively, he argues that the counsel he retained to bring the new trial motion rendered ineffective assistance.

A. Denial of new trial motion

Defendant's motion for a new trial was based on his contention that his trial counsel rendered ineffective assistance. He advances two arguments to show that the court denied the motion erroneously. First, he contends that his motion did show ineffective assistance, and second, the court erroneously excluded his trial counsel's testimony at the motion hearing.

In reviewing the denial of a new trial motion based on claimed ineffective assistance of counsel, we first consider the trial court's findings of fact. In doing so, we

make all presumptions in favor of the court's findings and uphold them if supported by substantial evidence. (*People v. Taylor* (1984) 162 Cal.App.3d 720, 724.) Then we consider whether the facts establish ineffective assistance of counsel. To the extent this is a question of law, we review the court's conclusion independently. (*Id.* at p. 725.)

To establish ineffective assistance of counsel, defendant must show that counsel's performance "fell below an objective standard of reasonableness," and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694.)

We hold that the record before the trial court did not support defendant's ineffective-assistance claim. We also hold that defendant withdrew his request to have his trial counsel testify at the motion hearing, thus not preserving the issue for appeal. Even if the issue had been preserved, we would not grant a new hearing because trial counsel's testimony could not possibly establish ineffective assistance in light of the motion's other inadequacies.

1. Ineffective assistance of trial counsel

The new trial motion claimed that defendant's trial counsel performed below the required level because of various failures to investigate and gather evidence. The sole evidentiary support submitted for the motion was a declaration by defendant's new counsel. Based on counsel's review of the trial transcript and discussions with defendant, his trial counsel, and the prosecutor, the declaration asserted the following failures:

(a) The public defender's office did not interview defendant until two months after his arrest and, apparently, counsel never interviewed him personally.

(b) Counsel failed to prepare defendant to testify.

(c) Counsel did not contact or subpoena unnamed friends, neighbors, and relatives who could have corroborated defendant's testimony that he was

attacked in his yard by unknown assailants and could have testified that he was a peaceful person and was "visibly changed" by the attack.

(d) Counsel did not interview other unnamed witnesses.

(e) Counsel did not consult with a psychologist or psychiatrist to obtain an expert opinion that, at the time of the shooting, defendant was suffering from post-traumatic stress disorder caused by the attack in his yard.

(f) Counsel failed to consult with a medical expert to obtain an opinion that the injuries defendant sustained when the victim's companions beat him "were consistent with his perception that he was in imminent danger" at the time of the shooting.

(g) Counsel did not consult with a forensic pathologist or other expert, did not examine the crime scene, and did not have a discussion with the defendant to gather evidence to rebut the medical evidence that the victim was shot in the back.

(h) Counsel failed to consult with a firearms expert "to investigate the operability and condition of the firearm …."

(i) Counsel called the victim's brother, Damaso, as a witness, but Damaso's testimony appealed to the jurors' sympathy for the victim.

At the hearing on the new trial motion, defendant submitted three exhibits. The first was a memorandum by an investigator for the public defender's office summarizing an interview with a waitress who was working at the bar the night of the shooting. The waitress stated that before the shooting, she served the victim, and "he started flirting with her and when she ignored him he became disrespectful and angry with her." A handwritten notation indicates defendant's counsel requested that the waitress be subpoenaed. The other two exhibits are the subpoena itself, and a worksheet showing an attempt to serve the subpoena on January 4, 2002, three days before trial, which was unsuccessful because the witness had moved out of town. Defendant argued that his trial

counsel should have been more diligent in trying to obtain the witness's testimony because she could have shown the victim's aggressiveness.

Defendant's claim on the motion for a new trial was, in essence, that if counsel had conducted additional investigation, there is a reasonable probability that she would have obtained exculpatory evidence that would have resulted in a different verdict. The court held that defendant did not carry his burden of proof. It stated that counsel's declaration that other evidence could possibly have been found was not sufficient. To prevail on the motion, the court stated, "requires someone to come in here and say that had this witness been summoned or had this investigation been done, this is what the result would be. This is [the] probative evidence to be offered at a second trial."

The court's ruling is correct for two reasons. First, defendant did not show that counsel's conduct was professionally unreasonable. We do not know, for example, why counsel did not attempt to show that the victim was not shot in the back. This is a case in which "'the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged. In such circumstances, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, *these cases are affirmed on appeal*.'" (*People v. Avena, supra,* 13 Cal.4th at p. 418.)

Second, defendant did not show that he was prejudiced. The assertions in counsel's declaration were speculative. These assertions did not show a reasonable probability that, but for the claimed errors, the result of the trial would have been different. For instance, prejudice obviously is not shown by the mere assertion that if a psychologist had been consulted, he or she might have opined that defendant suffered from post-traumatic stress disorder. Nor it is shown by the assertion that if character witnesses had been located they would have testified to defendant's peaceful character.

Defendant made only two minor claims of prejudice that were *not* based on speculation. First, the claim that calling Damaso as a witness generated sympathy for the victim is based on the fact that he was the victim's brother. But defendant's motion did

not show prejudice because it did not explain how any particular testimony of Damaso's was damaging. Second, the claim that the waitress could have given helpful testimony was based on the investigator's report of her statement that the victim bothered her. But it is not at all probable that testimony to that effect would have resulted in a different verdict.

This is a case in which both the purported facts on which defendant primarily relies and any reasons counsel had for her actions lie outside the record. Under these circumstances, "a claim of ineffective assistance is more appropriately made in a petition for habeas corpus." (*People v. Pope* (1979) 23 Cal.3d 412, 426, overruled on other grounds in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; see also *People v. Avena, supra*, 13 Cal.4th at p. 419.)

2. Lack of trial counsel's testimony at new trial motion hearing

Defendant asks for a remand for another hearing on his new trial motion because his trial counsel did not testify at the original hearing. Defendant's trial counsel was present, and his new counsel planned to call her as a witness. The prosecution had no objection. Before she could do so, however, the court interjected, asking, "Has anybody read [section] 1181 of the Penal Code lately? Counsel, it calls for declarations or affidavits." As the court began reading the section aloud, defendant's new counsel said, "I believe the Court is correct. [¶] … [¶] You have refreshed my recollection that is correct." The court read section 1181, subsection (8), in its entirety. Then the court said:

> "1181, of course, is based on various grounds that are permitted to be cited as a basis for a new trial. The only basis cited here is the--that counsel, trial counsel was ineffective and that that was prejudicial to the defendant. [¶] Any comment [defendant's new counsel] or [prosecutor]?"

Defendant's new counsel repeated that he believed the court was correct. The prosecutor agreed: "That's right. It's declarations." Defendant's trial counsel asked if she could be excused, and his new counsel said "[y]es."

It appears from this record that counsel and the court misunderstood section 1181, subsection (8). That subsection does provide that a motion based on new evidence is to be supported by witness affidavits. But, as defendant's memorandum of points and authorities pointed out, his motion was not based on section 1181. Ineffective assistance of counsel is not one of the nine grounds for a new trial set forth in section 1181. It is a "nonstatutory" basis for a new trial motion recognized by the Supreme Court in *People v. Fosselman* (1983) 33 Cal.3d 572, 582. (*People v. Taylor*, *supra,* 162 Cal.App.3d at p. 724.)

Notably, the court never ruled that defendant's trial counsel could not testify. The court merely raised the question of what the effect of section 1181 might be and invited counsel to comment. Defendant's new counsel then concluded that trial counsel should not testify and told her she could leave. The court did not rule, and defendant did not ask for a ruling to preserve the issue for appeal. "As a general rule, failure to preserve an issue in the trial court will preclude a party from raising that issue on appeal." (*People v. Dossman* (1991) 235 Cal.App.3d 1433, 1436.)

Defendant argues that we should consider the merits of the issue despite any failure to preserve it because the constitutional right to due process is at issue. We need not decide whether this is correct since defendant withdrew his request without obtaining a ruling. None of the cases defendant cites state that an issue should be reached on appeal under these circumstances. If we were to reverse and remand, we would in effect be holding that the court was obliged sua sponte to order defendant's new counsel to call and examine trial counsel. We know of no authority for this.

Defendant also likens this case to one in which a constitutional right cannot be relinquished without a knowing and intelligent waiver. (E.g., *Brookhart v. Janis* (1966) 384 U.S. 1, 4 [court's failure to obtain knowing and intelligent waiver of defendant's right to cross-examine witnesses against him].) But there is no authority for the

proposition that a court must obtain a criminal defendant's knowing and intelligent waiver under these circumstances.

Finally, even if we *were* to rule that the court was required sua sponte to order defendant's new counsel to examine defendant's trial counsel at the hearing, trial counsel's testimony could not cure the other deficiencies in defendant's motion. The fundamental problem with defendant's ineffective assistance claim would remain: with minor exceptions, it relies on speculation about what a deeper investigation could have shown. No testimony by defendant's trial counsel could establish, for instance, that expert opinion might establish that the victim was not shot in the back or that defendant was suffering from post-traumatic stress disorder.

B. Ineffective assistance of new trial motion counsel

Defendant argues that his new counsel was ineffective in bringing the new trial motion for the same reason his trial counsel was ineffective: He did not set forth the exculpatory evidence that trial counsel allegedly failed to obtain and present at trial. Defendant argues that his new counsel should have applied to the court for funds to hire an investigator and experts to conduct the investigation trial counsel did not undertake. This contention fails for one of the same reasons the attack on trial counsel's effectiveness failed—the alleged exculpatory facts are based on speculation. Defendant has not shown that he has been prejudiced by the failure to proffer evidence of them.

Defendant's contention that his new counsel was ineffective because he did not insist that trial counsel be allowed to testify is subject to the same infirmity. No record is before us of what trial counsel would have said.

Defendant relies on *Williams v. Turpin* (11th Cir. 1996) 87 F.3d 1204. That case only illustrates why his claim here fails. *Williams* is an appeal from the trial court's denial of a petition for a writ of habeas corpus. The petitioner argued that his counsel on a motion for a new trial was ineffective because of a failure to investigate. (*Id.* at p. 1208.) The Court of Appeals held that the petition should have been granted *so that*

evidence he proffered could be reviewed in an evidentiary hearing. (*Id.* at p. 1211.) That is the element missing here. At no stage has defendant proffered evidence that would have materially helped him if presented at trial. He has offered only speculation about evidence that might be found if someone were to look for it. As noted earlier, if such evidence should be found in the future, it could form the basis of a habeas petition.

Defendant cites *United States v. Cronic* (1984) 466 U.S. 648, which holds that, in some extraordinary cases, a defendant claiming ineffective assistance of counsel need not demonstrate prejudice. This is because the circumstances "are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." (*Id.* at p. 658.) These are cases in which it is shown that "counsel failed to function in any meaningful sense as the Government's adversary." (*Id.* at p. 666.) This is not such a case. As we have noted, the key "facts" counsel failed to discover may, so far as the record discloses, not exist at all. It is entirely possible that defendant's new trial motion counsel did all that could be done.

DISPOSITION

The judgment is affirmed.

_____
Wiseman, J.

WE CONCUR:

_____
Vartabedian, Acting P.J.

_____
Cornell, J.